

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**G.S., claiming as widow of M.S., Appellant**

**and**

**DEPARTMENT OF THE ARMY, PICATTINY  
ARSENAL, Dover, NJ, Employer**

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**Docket No. 06-1882  
Issued: January 4, 2007**

*Appearances:*

*Congresswoman Sue Kelly, for the appellant*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On August 10, 2006 appellant, through her representative, filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated May 23, 2006 which denied modification of its January 25, 2006 denial of compensation on the grounds that the claim had been untimely filed. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(1), the Board has jurisdiction over the timeliness issue of this case.

**ISSUE**

The issue is whether appellant filed a timely claim for death benefits under section 5 U.S.C. § 8122 of the Federal Employees' Compensation Act.

**FACTUAL HISTORY**

On September 22, 2005 appellant filed a Form CA-5, claim seeking compensation for the death of her husband, a chemical engineer. She indicated that the employee died in 1986, at the age of 62, from cancer (multiple myeloma). Along with the claim form, appellant included a letter indicating that the physician's report requested on the back of the form could not be

completed because the attending physicians would not remember the employee as his death occurred almost 20 years previously.

On December 23, 2005 the Office requested additional information from appellant, including a comprehensive narrative medical report from the treating physician giving a reasoned medical opinion on the direct cause of the employee's death and an explanation of why she had waited so long to file a claim. Appellant responded with a written statement, medical records and employment records.

In her statement, appellant indicated that she had not filed a claim at the time of the employee's death because "the government would not acknowledge that chemicals and radiation could cause cancer." She alleged that, because the employee performed classified weapon development work he could not tell her exactly what he was doing and that she did not realize the extent of his chemical and radioactive exposure until receiving his personnel files much later. Appellant did indicate that she was aware from early in her marriage that the employee was exposed to potentially dangerous substances because of the odor on his clothes when he returned from work. She alleged that she washed his clothes separately because she was afraid of contamination.

On September 22, 2005 appellant filed a claim for death benefits for her husband's December 19, 1986 death. She provided medical records dating from September 23, 1982 to August 6, 1985 and a death certificate.

On October 27, 1982 Dr. C. Richard Minick, a Board-certified anatomic pathologist, diagnosed the employee with bone marrow plasmacytosis and stated that the "number and characteristics of plasma cells is not sufficient for a diagnosis of multiple myeloma." The October 23, 1982 bone marrow aspiration report from Dr. Morton Coleman, Board-certified in hematologist and medical oncologist, stated that the findings were "highly suggestive and consistent with myeloma."

On May 16, 1983 Dr. Coleman conducted another bone marrow aspiration and found that the results were "consistent with lymphoplasmacytic disease." On March 8, 1984 Dr. Nathan Poker, currently a Board-certified radiologist, conducted a metastatic survey and found no definite evidence of bone metastatic disease. On August 6, 1985 Dr. Minick diagnosed the employee with "smoldering myeloma" [stage I myeloma]. The death certificate listed malignant melanoma as the immediate cause of death on December 9, 1986.

Appellant provided job descriptions from 1951 and 1960 and commendations from 1975 related to the employee's duties as a chemical engineer developing solid rocket propellants. She also provided a letter from Jacob Swotinsky, the employee's supervisor from 1950 to 1975. Mr. Swotinsky alleged that the employee was in weekly contact with the chemicals used to manufacture rocket propellants.

On January 25, 2006 the Office issued a decision denying appellant's claim because it was not timely filed. It found that she should have been aware of the relationship between the employee's employment and the claimed condition by December 9, 1989, three years after his death. The Office noted that the bone marrow aspiration reports "clearly showed a medical

problem in the early 1980s,” that the last date of the employee’s exposure to the chemicals would have been before his date of death and that appellant had stated that she realized that there was a possible relationship between the employee’s condition and employment early in their marriage. The Office found that all of these factors required a filing within three years of the employee’s death.

On February 6, 2006 the Office received a letter from the employing establishment stating that there were no disability or injury claims on file for the employee.

Appellant filed a request for review of the written record on February 17, 2006. In an accompanying letter, she provided new reasons for waiting until 2005 to file her claim. Appellant alleged that the employee displayed no symptoms of disease until 1981 and that he continued working until 1983. She claimed that she did not receive the employee’s personnel and classified records until the latter part of 2004. Appellant also indicated that she filed a claim under the Energy Employee’s Occupational Illness Compensation Program Act (EEOICPA), “as soon as [she] received the forms on August 8, 2001.” Presumably as part of the EEOICPA process, the National Institute for Occupational Safety and Health conducted a dose reconstruction for the employee on December 23, 2003.

On May 23, 2006 an Office hearing representative affirmed the Office’s denial of the claim on the grounds that the claim was untimely. The hearing representative found that appellant had not provided evidence to support her contentions that she was unable to file a claim prior to 2005 because the employee’s records were classified and that the government did not recognize chemical and radiation exposure as a cause of cancer. He also noted that appellant had admitted that she realized a possible relationship between the employee’s condition and his employment prior to 1986. Finding that she must have been aware of the relationship between the employee’s disease and his position as a chemical engineer by the time of his death, the hearing representative concurred that appellant’s 2005 claim was untimely.

### **LEGAL PRECEDENT**

Under the Act,<sup>1</sup> an original claim for compensation for injury or death must be filed within three-years after the injury or death of an employee.<sup>2</sup> In the case of death due to a latent condition, the time for filing a death claim does not begin to run until the employee has died and his survivors are aware of or by the exercise of reasonable diligence should have been aware of, the causal relationship of the employee’s death to factors of his employment.<sup>3</sup>

The three-year limit on filing a claim for compensation does not apply in the following limited circumstances: (1) the employee’s direct supervisor had actual knowledge that created reasonable notice of an on-the-job injury or death within 30 days;<sup>4</sup> (2) an employee or survivor

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> 5 U.S.C. § 8122(a).

<sup>3</sup> 5 U.S.C. § 8122(b); *Lucile B. Shores*, 49 ECAB 219 (1997).

<sup>4</sup> 5 U.S.C. § 8122(a).

gave formal written notice within 30 days of becoming aware that the injury or death was causally related to the federal employment;<sup>5</sup> (3) the employee filed a timely disability claim for a work-related injury or disability and the employee's death is based on the same injury;<sup>6</sup> and (4) the claimant is under 21 years old, the claimant is incompetent and has no legal representative, or the claimant is prevented from giving notice by exceptional circumstances.<sup>7</sup> Lack of awareness of possible entitlement, lack of information or ignorance of the law or one's rights and obligations under it do not constitute exceptional circumstances that excuse a failure to file a timely claim.<sup>8</sup>

### ANALYSIS

Appellant claims that the employee died three years after retiring because of a cancer caused by the harmful substances to which he was exposed during his employment as a chemical engineer. A latent disability requires appellant to show that she filed her claim within three years of the time she was aware or with reasonable diligence could have been aware, that the employee's death was due to factors of his federal employment.

Appellant's statement that she first became aware of the relationship between the employee's condition and his employment early in her marriage is not dispositive as there is no evidence that he had a diagnosed disease until 1981.<sup>9</sup> Additionally, the Board has held that mere concern about a history of exposure to dangerous substances without positive medical evidence does not begin the three-year period for filing a claim.<sup>10</sup> Even if appellant were aware at that time or at any time before the employee's death, as a survivor, she would still have three years from the date of his death to file her claim.<sup>11</sup>

The question is whether appellant was aware or should have been aware of the connection by the time of the employee's death in 1986. The medical evidence of record indicates that the employee was diagnosed with smoldering myeloma, the first stage of the

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<sup>5</sup> 5 U.S.C. § 8122(a) and (b).

<sup>6</sup> 5 U.S.C. § 8112(c).

<sup>7</sup> 5 U.S.C. § 8112(d).

<sup>8</sup> *Roger W. Robinson*, 54 ECAB 846 (2003) (government's failure to recognize for several years that Gulf War personnel were exposed to potentially dangerous chemicals not exceptional circumstances did not constitute exceptional circumstances); *see also Gwenda Brown*, Docket No. 05-1375 (issued November 10, 2005) (late receipt of Office determination that appellant's injury may be covered under the Act did not extend limits on filing a claim).

<sup>9</sup> *See Arbie L. Hampton*, Docket No. 05-1179 (issued August 16, 2005). ("It is inconsequential that appellant indicated on his April 12, 2002 claim form that he first became aware of his asbestos disease on May 24, 1985 [when some dust fell on his face] or that this was the date he first realized that his asbestos disease was causally related to his federal employment. Based on the medical evidence, appellant did not have an asbestos-related disease in 1985, nor was it reasonable for him to believe that he had such a compensable disability, as that phrase is used in the act.")

<sup>10</sup> *Edward C. Horne*, 43 ECAB 834 (1992).

<sup>11</sup> *Lucile B. Shore*, *supra* note 4.

disease, 16 months prior to his death. The medical diagnoses in the record draw no connection between the employee's disease to his employment, therefore, it is unclear whether appellant and the employee were aware of one. Because cancer may not be the type of disease that is obviously linked to any particular job activity, it is not clear whether the cancer diagnosis was sufficient to establish that by exercise of reasonable diligence the employee or appellant could have been aware of a causal connection.<sup>12</sup>

From the record, it is difficult to determine exactly when appellant became aware of the potential relationship between the employee's job as a chemical engineer and his death. However, it is certain that she knew there might be a connection by August 8, 2001, when she filed her claim under EEIOCPA. Assuming that this was the first time appellant had an awareness of the possible relationship, the three-year limitation would have started running from that point. She would have thus, been obligated to file her claim for compensation by August 8, 2004 to meet the statutory requirements.

Appellant argued that she could not have filed earlier because she was unable to access the employee's personnel records until late 2004. However, these records, though helpful to developing her claim, ultimately have little bearing on whether or not appellant was aware or should have been aware of a possible relationship between the employment and death of the employee. Appellant was clearly aware of a possible connection, even if she did not know all the details of the employee's duties when she filed her EEOICPA claim in 2001.

The Board finds that appellant did not file her claim for compensation within three years of becoming aware of the causal connection between factors of the employee's federal employment and his death.

Though appellant has not met the burden of proving that she filed within the three-year limitation, her claim could be considered timely if she met any of the statutory exceptions. The Board finds that these exceptions do not apply to her claim. There is no evidence in the record that the employee's immediate supervisor had actual knowledge that the employee's death was related to his employment. There is also no evidence that appellant or the employee provided written notice to the employing establishment within 30 days of becoming aware of the possibility that the employee's death or illness was causally related to his employment. Additionally, the employing establishment has verified that the employee filed no disability claims related to his federal employment.

None of the exceptions relating to a claimant's ability to file a claim apply in this case. Appellant was not a minor, has not alleged that she was incompetent and has not provided evidence of an exceptional circumstance that would excuse her failure to timely file the claim. Her unsupported contention that the government did not recognize exposure to chemicals and radiation as a cause of cancer does not qualify as an exceptional circumstance. In *Roger W. Robinson*, an employee alleged that for several years the Army did not acknowledge that

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<sup>12</sup> Compare *Virginia D. King*, 57 ECAB \_\_ (issued October 14, 2005) (finding that a diagnosis of asbestosis started running the three-year filing limit for an employee exposed to asbestos) with *Kathryn L. Cornett*, 54 ECAB 812 (2003) (autopsy that did not clearly link the employee's cause of death to his employment was not a basis for establishing that the claimant should have been aware of the causal relationship).

personnel had been exposed to potentially harmful chemicals during the time he was in Saudi Arabia. He also claimed that he was not told he could file a claim on injuries arising from that exposure until 1999, eight years after he left Saudi Arabia.<sup>13</sup> The Board held that this lack of access to information and unawareness of possible entitlement did not constitute an exceptional circumstance. The Holding in *Roger W. Robinson* forecloses appellant's argument in this case.<sup>14</sup> It should be noted that even if these circumstances did create an excuse, appellant did not file her claim until 2005, four years after the alleged change in policy that removed her barrier to filing.

### **CONCLUSION**

The Board finds that appellant did not file a timely claim for death benefits in accordance with 5 U.S.C. § 8122.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the May 23, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 4, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>13</sup> *Roger W. Robinson*, 54 ECAB 846 (2003), *supra* note 4.

<sup>14</sup> *Id.* at 851 (footnote 6 notes that "being held as a prisoner of war is the type of situation recognized by the Office as an exceptional circumstance).